



Town of Walpole
Commonwealth of Massachusetts
Zoning Board of Appeals

Zoning Board of Appeals
John Lee, Chairman
Susanne Murphy, Vice Chair
Robert Fitzgerald, Clerk
Mary Jane Coffey, Member
Drew Delaney, Member
David Anderson, Associate Member

DECISION – WALPOLE BOARD OF APPEALS CASE NO. 21-8

APPLICANT

Kearsarge Energy

LOCATION OF PROPERTY INVOLVED:

**1377 North Street
Walpole Assessors Map 5, Parcels 33, 35, & 36**

APPLICATION:

An ADMINISTRATIVE APPEAL of the Building Commissioner's denial of an application to construct and operate a 5.0 Megawatt (MC) AC ground-mounted solar and energy storage facility on property owned by Norfolk County and used/maintained by the Norfolk County Agricultural High School.

NOTICE OF HEARING:

Pursuant to Massachusetts General Laws, Chapter 40A, Sections 8 and 11, notification of a public hearing for Case 21-8 was advertised on July 7, 2021 and July 14, 2021 in a newspaper of local circulation (*Times Advocate*). The language of this public hearing notice was as follows:

**Town of Walpole
Zoning Board of Appeals**

Notice is hereby given that the Board of Appeals of the Town of Walpole will hold a **PUBLIC HEARING** in the MAIN MEETING ROOM of TOWN HALL on **WEDNESDAY, July 21, 2021 at 7:00 P.M.** on an Application from **Kearsarge Energy, Case #21-8**, with respect to the property located at **1377 North Street (Assessors ID 5-33, 35, 36), Walpole MA, Zoning District R.**

This Application is for an Administrative Appeal of the Building Commissioner with respect to the denial of an application to construct and operate a 5.0 MW AC ground-mounted solar and energy storage facility on the Norfolk Aggie School Campus that will provide AOBC's from the electrical output to the Aggie School and County, due to the determination by the Building Commissioner that the proposed use is not allowed by right.

BACKGROUND AND DELIBERATION:

Background

On May 11, 2021, Kearsarge Walpole LLC, a Massachusetts limited liability company ("Kearsarge" or "Appellant"), applied to the Town of Walpole Building Commissioner ("Building Commissioner") for a building permit to construct and operate a 5.0 Megawatt AC

ground-mounted solar and energy storage facility (the “Project”) on land owned by Norfolk County (“County”) at 1377 North Street in Walpole (the “Property”). In 2018, Kearsarge was the winning bidder in response to a Request for Qualifications (the “RFQ”) issued by the County who intended “to use the Project to address, meet, or exceed several of the goals, objectives, strategies, and actions identified herein including entering into a solar [Energy Management Services (“EMS”)] agreement that supports the County’s functions, policies and goals of: (1) reducing energy costs, (2) promoting and supporting the development of renewable energy resources, (3) reducing the County’s carbon footprint, and (4) developing a ninth through twelfth grade curriculum in solar energy that conforms to Common Core and Next Generation State Science Standards (See RFQ, p.6-7).”

As described by Kearsarge in its March 23, 2021 application for as-of-right site plan review with the Walpole Planning Board:

The [Property] is owned by Norfolk County and used by the Norfolk County Agricultural High School (“School”). Current uses of the property include hay production on a portion of the fields to support livestock operations on the main school campus and for classes. Norfolk County owns the three parcels which total approximately 53 acres. The proposed 7.2 Megawatt DC solar + storage project will be sited on 17.5 acres of the property. Panels will be mounted on racking that will utilize driven posts. The installation is sited to allow continued hay operations and utilizes downslope construction and tree screening to minimize visual impact from roadway sightlines. In addition, the project will add additional vegetative screening to minimize any visual impacts from North Street.

According to the same application, the “proposed solar development is a new business that increases the Town tax base (Walpole Planning Board Application, 3/23/21, p. 11).” The Project is estimated to “generate both lease revenues and energy cost savings for the School and the County of Norfolk for the life of the project” and “\$12,000 - \$15,000 / MW DC per year in expected tax revenues to the Town for the life of the project (Walpole Planning Board Application, 3/23/21, p. 10).”

The Project will provided power directly to the electricity distribution grid. According to the representatives of the County, approximately 56% of the power to be generated by the Project will be purchased by the County, a portion of which will be used by the School. The remaining 44% of the power will be sold to other customers of Kearsarge.

According to the RFQ, Kearsarge was to deliver the ninth grade curriculum within one hundred twenty (120) days of the award of the contract (See RFQ, p. 6-7). The contract was awarded to Kearsarge in January 2021 and, according to Kearsarge’s representative at the hearing, Kearsarge had not delivered the curriculum as of the date of the hearing. There is no evidence in the record as to Kearsarge’s experience or expertise in developing a Common Core or Next Generation State Science Standards curriculum.

On May 25, 2021, the Building Commissioner denied Kearsarge’s application for a building permit for the Project. The Building Commissioner concluded that (1) the Project constituted a Large Scale Ground Mounted Solar Pholtovotaic use that was not permitted in the zoning district

where the Property is located (Rural), (2) that the Project did not qualify as an educational use subject to the provisions of M.G.L. c. 40A, s.3, and (3) that the Project did not constitute or provide an essential government function that was immune from zoning regulation. On June 8, 2021, Kearsarge appealed the denial of the building permit to the Zoning Board of Appeal (the "Board").

The Board heard testimony from Kearsarge and several members of the public on July 21, 2021. Kearsarge described the Project and outlined its legal arguments against the Building Commissioner's position. The Building Commissioner described his rationale for denying the building permit application. Several members of the public spoke in opposition to the Project, stating among other things that the Property includes walking trails that are open to the public which connect to the Town-owned Adams Farm conservation area and that the Project would transform many acres of agricultural land into a solar field that would disrupt open space that has existed for many decades and would be an eyesore in a rural area. A recent graduate of the School spoke in opposition, saying that the students had not been in favor of the Project. Others spoke in favor of the Project, describing the need to support solar generation to combat the adverse effects of climate change both locally and across the country. No representatives of the County or the School provided testimony at the July 21, 2021 hearing.

The hearing was continued to August 9, 2021, where counsel for Kearsarge and the County summarized their respective legal positions (which had been submitted in writing for the record). The Building Commissioner spoke again in defense of his decision, and several members of the public spoke in opposition to the Project. The Board closed the hearing on August, 9, 2021. In addition to the oral testimony provided at the hearing, the Board reviewed the written submissions of Kearsarge, the County, and members of the public.

For the reasons discussed below, the Board voted 5-0-0 to deny the appeal of the Building Commissioner's decision.

Deliberation

The Appellant makes three arguments in response to the Building Commissioner's denial of the building permit for the Project: (1) that the Project constitutes an educational use and, therefore, under M.G.L. c. 40A, s. 3, it is subject only to reasonable regulations with regard to height, setbacks and the like; (2) that the Project constitutes an essential government function and, therefore, is exempt from municipal zoning requirements; and (3) that the denial of the building permit for the Project runs counter to M.G.L. c. 40A, s. 3's requirement that the Walpole zoning bylaw shall not prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare. Each argument is addressed below.¹

¹ In one public comment received by the Board, the commenter raised the issue of whether the County land that had been used for agricultural and recreational open space uses could be converted to a solar energy generation use without adhering to the requirements of Article 97 of the Massachusetts Constitution. Whether the Project requires legislative approval consistent with the requirements of Article 97 or the prior public use doctrine is not a zoning matter, was not a basis upon which the Building Commissioner denied the building permit application and, therefore, is beyond the Board's authority to consider and decide in this appeal.

1. The Board finds that the Project is not an educational use protected under the Dover Amendment.

According to M.G.L. c. 40A, s. 3:

No zoning ordinance or by-law shall... prohibit, regulate or restrict the use of land ... for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic...; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

The Supreme Judicial Court established a two-part test to determine whether a proposed use falls within the scope of the Dover Amendment's protection of educational uses. *See Regis College v. Town of Weston*, 462 Mass. 280, 285 (2012). "First, the use must have as its 'bona fide goal something that can reasonably be described as 'educationally significant' and the educationally significant goal must be the 'primary or dominant' purpose for which the land or structures will be used." *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 220 (2019) (internal quotations and citations omitted). The second part of test "helps ensure that a party invoking Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute." *Regis College*, 462 Mass. at 290.

According to the Request for Qualifications ("RFQ") prepared by the County, the County intended the Project to "address, meet, or exceed several of the goals, objectives, strategies, and actions identified herein including entering into a solar [Energy Management Services] agreement that supports the County's functions, policies and goals of: (1) reducing energy costs, (2) promoting and supporting the development of renewable energy resources, (3) reducing the County's carbon footprint; and (4) developing a ninth through twelfth grade curriculum in solar energy that conforms to Common Core and Next Generation State Science Standards." Counsel for the County re-iterated these objectives at the hearing, stating that the key purposes of the RFQ were to reduce utility costs for the County, reduce the County's carbon footprint, generate additional revenue for the County in terms of lease payments from Kearsarge, and to develop curriculum in solar energy.

The RFQ also required the delivery of the aforementioned curriculum within 120 days of the contract award. According to representatives of Kearsarge, the contract was signed by Kearsarge in January of 2021 but the curriculum had not yet been developed and provided to the County. Moreover, Kearsarge identified no new courses to be offered at the School but, instead, listed pre-existing courses and curriculum for "potential integration" that might benefit from the Project. The Board also noted that no representatives of the School attended or spoke at the hearing, and there is no evidence in the record to indicate that Kearsarge possesses the expertise or experience to develop a curriculum that is consistent with Common Core or Next Generation State Science Standards.

Based upon the foregoing, and the testimony provided during the public hearing, the Board finds that the second step of the SJC's test in *Regis* is not satisfied -- that is, any educational goals of the Project are not the "primary or dominant purpose" of the Project's use of the land and structures for the solar installation. Three of the four goals laid out by the County in the RFQ, while laudable, are not educational. They relate to raising revenue via lease payments from a private party, reducing the County's overall carbon footprint, and reducing the County's utility costs. The fourth goal, that of developing a ninth through twelfth grade curriculum that meets Common Core and State Science Standards, is in the Board's view an incidental benefit rather than a primary or dominant purpose of the Project.

Because the Project fails one of the two parts of the *Regis* test, the Board did not resolve whether the Project's educational goals are "educationally significant," but notes that the School is, by statute, required to develop a curriculum in "agricultural programs," defined to be "the preparation of students for occupations connected with agriculture, the care of domestic animals, forestry and other wage earning or productive work on farm land" M.G.L. c. 74, s. 1. *See also* M.G.L. c. 74, s. 35 ("The... Norfolk county agricultural school shall provide instruction in agriculture and, at a time approved by the commissioner, in household arts or homemaking.").

2. The Board finds that the Project does not perform an essential government function of Norfolk County.

The County argues that the Project is immune from zoning regulation because the Project performs an essential government function. "The doctrine of essential governmental function prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose, absent statutory provisions to the contrary." *Greater Lawrence Sanitary District v. Town of North Andover*, 436 Mass. 16, 21-22 (2003) (additional citations omitted). "This does not mean, however, that the legislatively created entity has absolute immunity from all local regulation. It remains subject to regulations ... that do not interfere with its ability to fulfill its essential governmental purposes and have only a negligible effect on its operations." *Id* at 22.

The County asserts that it has broad powers including "(1) the care of County Property, (2) the Management of the County's Business Affairs, (3) the Sale or Lease of County Property, (4) the Preparation of County Budgets, (5) the Taxation of Cities and Towns, and (6) the Funding of Public School Education." *See* Lawson and Weitzen Letter (2018) p. 9.

While the County may have the authority to lease its property, the Board finds that this is not the end of the matter. The key issue is whether the purpose for which the property is leased is an essential government function. In this case, the Board concludes that the Project does not provide an essential government function. The County has not pointed to any statutory authority for the proposition that one of its essential government functions (i.e., "legislatively mandated purpose" per *Greater Lawrence Sanitary District*) is to generate electricity for the County's use or to lease land to a private party to do the same. Indeed, underscoring the fact that energy production is not an essential County function was the County's admission that it had never owned or operated a power plant of any kind in its more than 225-year history. This is not unexpected, because the County's administrative departments consist of the Commissioners' Office, the Treasurer's

Office, the Registry of Deeds and Land Court, and the School, and counsel for the County agreed that the County did not have an energy or other department charged with renewable energy generation, combatting climate change, or reducing the County's carbon footprint.

Moreover, the County did not provide any meaningful evidence to indicate that the denial of the building permit would have any more than a negligible effect on County operations.

Based upon the foregoing and the materials contained in the public record, the Board finds that the Project does not constitute or provide an essential government function of Norfolk County.

3. The Board finds that the Walpole zoning bylaw does not prohibit or unreasonably regulate the installation of solar energy systems.

Finally, Kearsarge argues that the Building Commissioner's decision should be overturned because it is contrary to the language of M.G.L. c. 40A, s. 3 which provides that, "No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy except where necessary to protect public health, safety and welfare."

At its annual meeting held on October 15, 2012, the Walpole Town Meeting adopted Section 15 of the Zoning Bylaw entitled "Large-Scale Ground-Mounted Solar Photovoltaic Overlay District" along with a map indicating the locations of the overlay district (the "SPOD"). The SPOD was approved by the Attorney General on December 6, 2012, without comment on the size or location of the SPOD, but noting the above-referenced language of M.G.L. c. 40A, s.3 and stating that the site plan review requirement of Section 15 could not be used to deny a project that was otherwise allowed by right in the overlay district.

Kearsarge relies on a recent decision in *Tracer Lane II Realty, LLC v. City of Waltham*, an unreported decision of the Land Court dated March 5, 2021 (2021 WL 861157). In *Tracer Lane*, a solar energy facility to be located in the Town of Lexington required an access roadway to be constructed in a residential subdivision in the adjacent City of Waltham. The City argued that use of the road in a residential neighborhood to access a commercial use in another Town did not comply with the City's zoning ordinance, because solar energy facilities "arguably" should be treated like a "power station" which was permitted only within the four industrial zones within the City and prohibited everywhere else in the City. While the Court rejected the City's argument, it also did not decide the more general question of "whether a municipality may in some circumstances prohibit solar energy facilities in some districts while permitting them in others without running afoul of G.L. c. 40A, s. 3". *Tracer Lane* at *6.

The Board finds that this case is significantly different than *Tracer Lane*. First, unlike the City of Waltham zoning ordinance, it is a fact -- not just "arguable" -- that the Town of Walpole zoning by-law authorizes solar energy facilities throughout the Town. The SPOD, as approved by the Attorney General, applies only to those ground-mounted solar installations of 0.25 MW or more of capacity. The SPOD does not prohibit smaller ground-mounted installations anywhere in the Town, nor does it prohibit rooftop solar installations of any size in any zoning district. Thus, as its name suggests, the focus of the SPOD is to direct larger solar installations -- such as

Kearsarge's proposed 17.5-acre installation -- to those areas of Town that the Town Meeting legislatively determined were appropriate for larger installations. Moreover, the zoning district at issue here -- the Rural District -- has as its primary purpose "to provide for an area for agriculture, open space, and lower density, single-family residential use" and which is "intended to secure for residents a pleasant environment retaining as many natural features as possible ..." Walpole Zoning Bylaw, Section 4(2)(A)(1). The Board finds that the Town Meeting's legislative determination to limit the size and scale of ground-mounted solar installations in this zoning district was reasonable and notes that Walpole Zoning Bylaw, Section 15 and the SPOD map ultimately were approved by the Attorney General.

VOTE OF THE BOARD:

MOTION made by Mr. Fitzgerald and seconded by Ms. Coffey to deny the appeal and uphold the decision of the Building Commissioner.

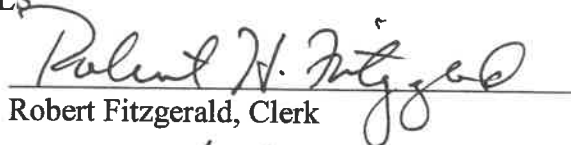
In Favor: Susanne Murphy, Vice Chair
Robert Fitzgerald, Clerk
Mary Jane Coffey, Member
David Anderson, Associate Member
Drew Delaney, Member

Opposed: None.

The vote was five (5) in favor, zero (0) opposed, and zero (0) abstained resulting in a **vote of 5-0-0 which upheld the decision of the Building Commissioner and denied the applicant's appeal.**

APPEALS FROM THIS DECISION FOR A SPECIAL PERMIT, IF ANY, SHALL BE MADE PURSUANT TO MASSACHUSETTS GENERAL LAWS CHAPTER 40A, SECTION 17, AND SHALL BE FILED WITHIN 20 DAYS AFTER THE DATE OF FILING OF THE NOTICE OF DECISION IN THE OFFICE OF THE CITY OR TOWN CLERK.

WALPOLE ZONING BOARD OF APPEALS


Robert Fitzgerald, Clerk

Date: 8/20/21

cc: Town Clerk Engineering Planning Board
Board of Selectmen Building Inspector Conservation Commission

This decision was made on August 9, 2021 and filed with the Town Clerk on August 20, 2021.